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IN THE

# Supreme Court of the United States

October Term, 1971

No. .....

71-630

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
AND
HONORABLE JESSE W. CURTIS,
*Petitioner,*

*vs.*

71-631

COURT OF APPEALS FOR THE NINTH CIRCUIT,
ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Respondents.*

---

**Motion for Leave to File**
**and**
**Petition for a Writ of Prohibition.**

---

No. .....

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
AND
HONORABLE JESSE W. CURTIS,
*Petitioner,*

*vs.*

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Respondents.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

---

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COURT OF APPEALS FOR THE NINTH CIRCUIT,
ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Respondents.*

## Motion for Leave to File Petition for a Writ of Prohibition.

*To the Honorable Supreme Court of the United States:*

Petitioner, the United States District Court for the Central District of California and the Honorable Jesse W. Curtis, Judge of that Court, respectfully moves the Supreme Court of the United States for leave to file the annexed petition for a writ of prohibition directed to the United States Court of Appeals for the Ninth Circuit, permanently staying enforcement of its order, filed April 21, 1971, in *Rosalio Munoz and Michael Tigar v. Honorable A. Andrew Hauk and Honorable Jesse W. Curtis,* No. 26587 in the records and files of that court. The petition for a writ of prohibition is combined with a petition for a writ of certiorari directed to the same court to review that same order. Said order summarily directed petitioner to admit re-

spondent Tigar *pro hac vice* for the purpose of representing respondent Munoz in the trial of a criminal action arising under the selective service law.

The writ of prohibition is prayed because it may be contended that the petition for a writ of certiorari is not timely. On May 5, 1971, within the fourteen days provided by Rule 40(a) of the Federal Rules of Appellate Procedure, petitioner filed with the Court of Appeals a Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc. On August 9, 1971, the Court of Appeals denied that petition, ruling that it was "untimely because it was filed after mandate was ordered issued" but considering it on the merits as a petition to recall the mandate and suggestion of appropriateness of rehearing in banc.

Under these circumstances, if it should be held that the time for filing a petition for a writ of certiorari has expired (*i.e.* on July 20, 1971), petitioner will have been deprived of the opportunity to seek review of the Court of Appeals' order of April 21, 1971. The writ of prohibition sought would then be necessary and proper to preserve the jurisdiction and power of supervision of this Court to correct far departures from the accepted and usual course of judicial procedures and to prevent usurpation of power by a Court of Appeals.

Respectfully submitted,

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IN THE

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COURT OF APPEALS FOR THE NINTH CIRCUIT,
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**Petition for a Writ of Prohibition.**

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UNITED STATES DISTRICT COURT
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*Petitioner,*

*vs.*

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

Petitioner, the United States District Court for the Central District of California, and the Honorable Jesse W. Curtis, Judge of that Court, petitions the Supreme Court of the United States for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the order of that Court, filed

April 21, 1971, in *Rosalio Munoz and Michael E. Tigar v. Honorable A. Andrew Hauk and Honorable Jesse W. Curtis,* No. 26587 in the records and files of that Court. Alternatively, petitioner petitions the Court for a writ of prohibition directed to the Court of Appeals, permanently staying enforcement of that order or any mandate issued thereon.

**Opinions Below.**

The Court of Appeals rendered four opinions and orders, dated December 17, 1970, March 17, 1971, April 21, 1971 and August 9, 1971, which are appended hereto as Appendices A, B, C and D, respectively. The first is unpublished. The second has been published as *Rosalio U. Munoz and Michael E. Tigar v. Honorable A. Andrew Hauk and Honorable Jesse W. Curtis,* 439 F.2d 1176 (9th Cir. 1971). The third and fourth have been published as *Rosalio Munoz and Michael E. Tigar v. United States District Court, Central District of California,* 446 F.2d 434 (9th Cir. 1971).

**Jurisdiction.**

On April 21, 1971, two of a panel of three Judges of the United States Court of Appeals for the Ninth Circuit, pursuant to a motion filed by Munoz and Tigar, filed its opinion and order summarily directing Judge Curtis to admit Tigar *pro hac vice* for the purpose of representing the defendant in *United States of America v. Rosalio Urias Munoz,* pending as No. 6540 Criminal in the United States District Court for the Central District of California. Purporting to invoke the provisions of Rule 2, Federal Rules of Appellate Procedure, the order directed that mandate should issue forthwith. Circuit Judge Duniway dissented.

On May 5, 1971, within the fourteen days provided by Rule 40(a) of the Federal Rules of Appellate Procedure, Petitioner filed in the Court of Appeals a Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc. ("Petition for Rehearing" herein.) A request for an in banc rehearing, signed by eleven of thirteen active judges and two senior judges of the District Court, accompanied the petition.

On August 9, 1971, the Court of Appeals filed its order denying a rehearing and a rehearing in banc. Of the eleven active judges participating, five directed that it be noted that they would have heard the cause in banc and three filed written dissents to the order. The order ruled the petition "untimely because it was filed after mandate was ordered issued," but construed it as a petition to recall the mandate and a suggestion of rehearing in banc and considered it on its merits.

Nevertheless, the Petition for a Writ of Certiorari is timely under 28 U.S.C. § 2102(c), because:

(a) A timely petition for rehearing suspends the running of the 90-day period for filing a petition for a writ of certiorari. *Gypsy Oil Co. v. Escoe,* 275 U.S. 498 (1928);

(b) The petition was timely under the provisions of Rule 40 of the Federal Rules of Appellate Procedure which refers only to entry of judgment and makes no mention of issuance of mandate.

(c) Entry of judgment as prepared and signed by the clerk, pursuant to Rule 36 of the Federal Rules of Appellate procedure, has nothing to do with the issuance of mandate under Rule 41 of the Federal Rules of Appellate Procedure.

(d) The Court of Appeals' action was equivalent to reconsidering its order that mandate issue and considering the petition for rehearing on its merits.

(e) The shortening of the 21-day period for issuance of the mandate provided in Rule 23 of the Federal Rules of Appellate Procedure should not have the effect of cutting off the Supreme Court's right to exercise its power of supervision of the lower courts.

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) with respect to the petition for a writ of certiorari and under 28 U.S.C. §1651(a) with respect to the petition for a writ of prohibition.

**Question Presented.**

Under a local rule respecting admission of counsel to practice *pro hac vice*, the District Court denied admission to an applicant. On petition for mandamus, the Court of Appeals concluded that the District Court had acted on a construction of the rule that denied the District Court discretion to grant the application, held that the rule vested discretion in the District Court to admit or not admit, and remanded the matter to the District Court to exercise its discretion under the rule as construed by the Court of Appeals. The District Court then did exercise its discretion and, in that exercise, again denied admission to the applicant. Thereupon the Court of Appeals commanded the District Court to admit the applicant, one judge dissenting on the ground that, while a Court of Appeals on mandamus can direct an inferior court to exercise discretion, it is without power or jurisdiction to compel a judge to exercise his discretion in a particular way.

Has not the Court of Appeals usurped power which rightfully belongs to the District Court alone? Should not this Court correct that usurpation in order to maintain the proper boundaries of authority between District Court and Court of Appeals?

**Statutes and Rules Involved.**

28 U.S.C. § 1654 reads as follows:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

28 U.S.C. § 2071 reads as follows:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 83 of the Federal Rules of Civil Procedure reads as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Rule 57(a) of the Federal Rules of Criminal Procedure reads, in pertinent part, as follows:

> "Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. . . ."

Rule 1(d) of the Rules for the United States District Court for the Central District of California reads in pertinent part as follows:

> "(d) Admission of Non-Residents for A Specific Case:
>
> 1. Any member in good standing of the Bar of any United States Court, or of the highest Court of any State or of any Territory or Insular Possession of the United States, who has been retained to appear in this Court, and who is not a resident of this District, or does not maintain an office in this District for the practice of law, may be permitted after application, without previous notice, to appear and participate in a particular case."

**Statement of the Case.**

Michael E. Tigar, a UCLA law professor residing in the Central District of California and a member of the bar of the District of Columbia but not of the bar of the Central District of California or the State of California, asked to be permitted to represent Rosalio Munoz who is charged with violating the Selective Service Law. 50 U.S.C. § 462. His request was first denied by Honorable A. Andrew Hauk, Judge of the United States District Court for the Central District of California. The case was transferred for further proceedings to Honorable Jesse W. Curtis, Judge of the same District Court, before whom the request was renewed, and Judge Curtis likewise denied that request. The

Court of Appeals subsequently took the view that both rulings were based on the premise that local rule 1(d) applied only to attorneys who maintain neither their residence nor an office for the practice of law in the District. The construction of the local rule is not an issue here.

A Petition for Writ of Mandamus filed by Tigar and Munoz in the Court of Appeals was denied by a panel of that Court on March 17, 1971, which remanded the proceeding to Judge Curtis* for further proceedings, stating:

> ". . . Absent some constitutional restriction, it should properly rest *within the discretion* of any court to determine who shall be admitted to practice before it and in what circumstances" but that neither of the judges "based their rejections upon the exercise of discretion in the ordinary sense."

The Court noted that another Judge of the same District Court had construed the rule as permitting Tigar's *pro hac vice* admission in another case but viewed it "inappropriate" that the conflict be resolved by it in the first instance, adding:

> ". . . we think it more desirable that the present ambiguity as to the meaning of the word 'or' in the District Court's present rules be resolved in favor of Munoz and Tigar. The District Judge should then decide whether the rule permits admission of Tigar *pro hac vice* and, if so, whether *in the exercise of his sound discretion* to so admit him. We are confident Judge Curtis *will not*

*The Petition was dismissed as against Judge Hauk by the Court of Appeals' order filed December 17, 1970 (Appendix A), because he was no longer concerned with the subject cause.

*exercise his discretionary power arbitrarily.*"** (Appendix B.)

Following remand, Judge Curtis conducted a further hearing at which he again denied Tigar's request. At the hearing Judge Curtis questioned Tigar about what he had done, if anything, to control the conduct of two defendants whom he had represented *pro hac vice* in the "Seattle 7" criminal trial in Tacoma and who had been adjudged in contempt for misconduct. Tigar refused to answer on the ground of attorney-client privilege. Judge Curtis made it clear that he was calling for privileged conversations but simply wanted to know if Tigar had done anything to prevent his clients from behaving as they had.

Judge Curtis also indicated that he disagreed with the Court of Appeals' construction of the local rule. However, after a lengthy colloquy between Judge Curtis and Michael Kennedy, a member of the bar of the Northern District of California and of the State of California, who was admitted *pro hac vice* to appear on Tigar's behalf at the hearing, Judge Curtis stated:

> ". . . The reason is that *aside from the rule* it doesn't seem to me that this court should permit a resident of the State to practice in this court where by so doing we are encouraging him and making it possible for him to violate the Business and Professions Code.
>
> "He is doing so in direct violation of the Business and Professions Code. He is not admitted

**Emphasis here and elsewhere added unless otherwise noted.

to practice in this State. Being a resident, he should not be permitted to practice in this court *rule or no rule.*

"MR. KENNEDY: But, your Honor, there was a gentleman here this morning from Chicago, who is not a member of the bar, practicing before your Honor.

"THE COURT: That comes under an entirely different procedure, because he is not a resident of this State. That's what we are talking about.

"MR. KENNEDY: The point is, then, that exclusively because Mr. Tigar is a resident is the reason your Honor is disallowing his application for admission pro hac vice this morning?

"THE COURT: I am *exercising my discretion* in this matter and am refusing to grant the motion, period." (Appendix E.)

Munoz and Tigar then filed a motion in the Court of Appeals to enforce its order and compel Judge Curtis to admit Tigar. On April 21, 1971, two of the judges of the panel issued an order directing Judge Curtis to admit Tigar *pro hac vice* for the purpose of representing Munoz in the pending criminal action. The order directed that mandate should issue forthwith, purportedly pursuant to the provisions of Rule 2, Federal Rules of Appellate Procedure. Circuit Judge Duniway dissented from the order made upon the ground that under the cases of *Will v. United States,* 389 U.S. 90, 104, 107 (1967), and *Hooker v. United States District Court,* 380 F.2d 5, 6 (9 Cir. 1967), mandamus

could not be used to compel a judge to exercise his discretion in a particular way and that was what the two judges were doing. (Appendix C.)

Judge Curtis based the aforementioned Petition for Rehearing upon the ground stated by Circuit Judge Dunaway and upon the further ground that the decision was contrary to the decision of the same court in *Application of Wasserman,* 240 F.2d 213, 216 (1956), which held that admissions were subject to the control of the District Court and lawfully could be conditioned upon admission to the bar of the State of California. Included with this petition was a statement by Judge Curtis setting forth the reasons why he exercised his discretion to deny permission to Tigar to appear in said action. (Appendix F.) This request for a rehearing in banc was joined in by eleven of the thirteen active judges of the District Court and two senior judges thereof. (Appendix G.)*

The petition was denied by a vote of six of the eleven participating active judges of the Court of Appeals on August 9, 1971.** Five directed that it be noted that they would have granted a rehearing in banc and three filed written dissents to the denial. The order denying the petition construed it as a petition to recall the mandate and stated that, the petition having been considered on the merits, it was denied. (Appendix D.)

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*We are authorized to state that each of the signers of the request (Appendix G) concur in Judge Curtis' decision to seek review of the Court of Appeals' order of April 21, 1971.

**One active judge disqualified himself. Despite his dissent to the April 21, 1971 order, Circuit Judge Duniway did not vote for a rehearing in banc.

## REASONS FOR GRANTING THE WRIT.

The action of the Court of Appeals in disregarding the exercise of discretion by Judge Curtis in refusing *pro hac vice* admission to Tigar and summarily ordering his admission, "so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision." Rule 19, Rules of the Supreme Court of the United States. Even if the majority were correct in its assertion that Judge Curtis had not in fact exercised his discretion, the Court of Appeals' usurpation of a power resting solely in the District Court would still fall within the letter of the quoted language.

In ordering the admission of Tigar *pro hac vice*, the Court of Appeals disregarded the long line of authority, commencing with *United States v. Lawrence*, 3 U.S. (Dallas) 42, 52-53 (1795), establishing that mandamus will not lie to compel a judge to exercise his discretion in a particular way.

*Will v. United States*, 389 U.S. 90 (1967), reversed the issuance of a writ of mandamus to compel a United States District Judge to vacate an order requiring the Government to disclose certain information in a criminal action. This Court stated:

> ". . . The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional

circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd. v. United States,* 325 U.S. 212, 217 (1945). Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations,' *Ex parte Peru,* 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper,* 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States Dist. Court,* 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957); see *McCullough v. Cosgrave,* 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James,* 272 U.S. 701, 706, 707 (1927) (dictum). And the party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable." ' *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 384 (1953); see *United States v. Duell,* 172 U.S. 576, 582 (1899)."

389 U.S. at 95-96.

Judge Curtis' action was not even remotely analogous to those cited cases in which mandamus was held proper.

The rule restricting mandamus to the most exceptional cases is particularly appropriate for application here. The District Court is specifically empowered to

provide by rule for the admission of attorneys to practice therein. 28 U.S.C. § 1654; *In re Wasserman, supra,* at 214. To be sure, such rule (and the exercise of discretion under it) must be consistent with Acts of Congress. 28 U.S.C. § 2071; *Sanders v. Cox,* 401 F.2d 241, 244 (5th Cir. 1968) It must also be consistent the federal rules. Rule 83, Federal Rules of Civil Procedure; Rule 57(a), Federal Rules of Criminal Procedure. But this is not a case where either the local rule or any factor considered by Judge Curtis is inconsistent with statute or overriding rule. In *Sanders v. Cox, supra,* the local rule effectively precluded representation of plaintiffs in civil rights cases in Mississippi. Here, there is no question of availability of counsel. As Circuit Judge Duniway stated in his dissent:

> "The Munoz case is just another draft case of which a large number are tried in the California federal courts every year. I can and do take judicial notice that there are plenty of competent attorneys in the Central District of California whom Munoz can find to represent him and who know a great deal about draft cases." (Appendix C.)

At the hearing after remand, Judge Curtis was entitled to take into consideration Tigar's failure to respond to the question whether he had done anything to control his clients. Judge Curtis' statement of reasons filed with the Petition for Rehearing (Appendix F) makes it clear that he did not believe Tigar had.

Moreover, regardless of the correct construction of the local rule, Judge Curtis was entitled to take into consideration the fact that Tigar, while a professor of law at UCLA, had participated in the past year in about ten criminal cases in New Orleans, Chicago,

Washington, D.C., Dallas, Marin County, Fresno, Seattle, San Francisco and Los Angeles, all on a *pro hac vice* basis. He admittedly performed much of his preparation for those cases in Los Angeles (*i.e.* was practicing law there) without being admitted to the bar there. (Appendix E).

These factors provided a sufficient basis for refusing *pro hac vice* admission in this case. Indeed, the Court of Appeals had specifically approved a requirement of admission to the bar of the State of California as a prerequisite to admission to practice generally in this same District Court. *In re Wasserman,* 240 F.2d 213, 214 (9th Cir. 1956). In addition, Judge Curtis was reliably informed of affirmative misconduct by Tigar. (Appendix F.) Therefore, there was no basis for the Court of Appeals' assertion that Judge Curtis had failed to exercise his discretion.

However, if there were a basis for the assertion, the Court of Appeals was not empowered to exercise the discretionary function of the trial judge. As this Court ruled in *Platt v. Minnesota Mining and Mfg. Co.,* 376 U.S. 240 (1964):

> ". . . Extraordinary writs are 'reserved for really extraordinary causes,' *Ex parte Fahey,* 332 U.S. 258, 260 (1947), and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should

> not have done since the writ cannot be used 'to actually control the decision of the trial court.' *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953)."

The admittedly "precatory" language in the Court of Appeals' order, filed March 18, 1971 (Appendix B), with respect to "desirable" resolution, for purposes of this case, of the ambiguity it found in the local rule, made it far from clear that it would summarily order Tigar's admission if Judge Curtis chose to abide by his construction. Indeed, it nowhere intimated that the Court of Appeals believed it had the power to do so. On the contrary, the Court of Appeals' disavowal of any intent "unreasonably or officiously to intrude into the affairs of the District Court" seemingly pointed in the opposite direction. Particularly so, since in the responsive papers to the Petition for a Writ of Mandamus, it was pointed out that at least eight of the other judges of the District Court concurred in Judge Curtis' construction of the rule. He might reasonably have believed that deference would be given to the District Court's construction of its own rule. Certainly, nothing was said or done at the hearing on remand indicating that Judge Curtis was acting in defiance of the Court of Appeals. Under the circumstances, the most that that Court should have done was to clarify its own order.

The matter was well summarized in Circuit Judge Duniway's dissent:

> ". . . However, the rule does not require his admission, assuming eligibility; it only permits it. It seems clear to me that Judge Curtis would not

admit him if he believed that the rule permitted admission. I would not compel him to do so. *Will v. U.S.*, 1967, 389 U.S. 90, 104, 107, and *Hooker v. U.S.D.C.*, 9 Cir., 1967, 380 F.2d 5, 6, make it clear that mandamus is not to be used to compel a judge to exercise his discretion in a particular way. That is what the majority is doing."

The foregoing are the reasons for granting the writ of certiorari. If certiorari is unavailable, the same reasons apply with equal force to the petition for a writ of prohibition. In the latter event, prohibition is necessary and proper to preserve the jurisdiction and power of this Court to correct the far departure of the Court of Appeals from the accepted and usual course of judicial procedures. The petition demonstrates that prohibition would be 'necessary and appropriate in aid of this Court's jurisdiction." 28 U.S.C. § 1654; *Chandler v. Judicial Council,* 398 U.S. 74, 86 (1970). The petition further demonstrates that prohibition would be "agreeable to the usages and principles of law," 28 U.S.C. § 1654, in that it would correct a "judicial usurpation of power," *Will v. United States,* 389 U.S. 90 (1967).

**Conclusion.**

The question in this case is not whether a man named Michael Tigar, not a member of the bar of the District Court, should be admitted *pro hac vice* to represent one Munoz. The question is one of the respective spheres of authority of District Court and Court of Appeals, particularly in an area so traditionally

under the authority of the District Court as admission to practice before it. We suggest that this is a case warranting not only grant of an appropriate writ but also summary disposition by direction to the Court of Appeal to vacate its order, either *simpliciter* or with a suggestion that it grant a rehearing in banc. See, *Western Pacific Red Corp. v. Western Pacific Red. Co.*, 345 U.S. 247, 267 (1953).

Respectfully submitted,

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JOSEPH A. BALL,
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*Attorneys for Petitioner.**

*Counsel for petitioner were designated by the State Bar of California. However, it has not been consulted with respect to and is not responsible for the content of this petition.

# APPENDIX A.

## Order.

United States Court of Appeals for the Ninth Circuit.

Rosalio U. Munoz and Michael E. Tigar, Petitioners, v. Hon. A. Andrew Hauk and Hon. Jesse W. Curtis, Respondents. No. 26587.

Before: ELY and WRIGHT, Circuit Judges.

It appearing that the Honorable A. Andrew Hauk is no longer concerned with the subject cause, the Petition for Writ of Mandamus, as against him, is dismissed.

It has come to the attention of the court that, since the filing of the Petition, Michael E. Tigar, Esq., has been admitted to appear, *pro hac vice,* as an attorney for the defendant in *United States of America v. Melvin Carl Smith,* No. 4277CD, now pending in the United States District Court for the Central District of California.

The United States Attorney for the Central District of California, who has filed a Response to the subject Petition, is hereby requested to supply this court, at the earliest possible date, with a transcript of the proceedings conducted in connection with the granting of Mr. Tigar's motion to appear as counsel in *United States v. Smith,* No. 4277CD. Pending the receipt of such transcript, the court reserves its ruling on the Petition, insofar as it is directed to the Honorable Jesse W. Curtis.

## APPENDIX B.

### Order on Petition for Writ of Mandamus.

United States Court of Appeals for the Ninth Circuit.

Rosalio U. Munoz and Michael E. Tigar, Petitioners, v. Hon. A. Andrew Hauk and Hon. Jesse W. Curtis, Respondents. No. 26587.

Before: DUNIWAY, ELY, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

This Petition arises out of *United States v. Munoz*, District Court No. 6540, a criminal proceeding in which Munoz is charged with having violated the Military Selective Service Act of 1967, 50 U.S.C. App. § 451 *et seq.* To represent him in the criminal proceeding, Munoz sought the assistance of Michael Tigar, his co-Petitioner in this court. In June, 1961, Tigar was appointed acting assistant professor of law at the University of California at Los Angeles. When he took up the position he became, and ever since has been, a resident of California. He has never sought admission to the California bar. For the purpose of representing Munoz, he applied for admission, *pro hac vice*, to the Bar of the United States District Court for the Central District of California. He had never theretofore appeared as an attorney in the Central District, nor had he previously sought leave to do so. A hearing on the application was conducted by the Honorable A. Andrew Hauk, to whom Munoz' criminal case had been assigned for the purpose of arraignment and plea. The evidence produced at such hearing contains no suggestion that Tigar is morally or professionally unfitted for the practice of law or for admission to the Bar of

any federal court. [1] Tigar is a graduate of the Law School of the University of California at Berkeley and has been admitted to practice before the United States District Court and the United States Court of Appeals for the District of Columbia. He represented that, were he to be granted leave to assist Munoz, he would do so without fee.

Judge Hauk denied Tigar's application to appear *pro hac vice* for the representation of Munoz. In doing this, Judge Hauk, as we have already indicated, did not suggest that Tigar was morally or professionally unfit. He based his ruling solely upon the provisions of Rule 1(d), Rules of the District Court for the Central District of California. Rule 1(d) read, in pertinent part, as follows:

> "Any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, *or* does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear and participate in a particular case. * * *" (emphasis added)

Judge Hauk apparently interpreted the quoted Rule as permitting the admission to the Bar of the Central District, *pro hac vice*, only of those attorneys who are nonresidents of the Central District *and* who do not maintain an office for the practice of law in the Central District. As Tigar is a resident of the Central District, the Rule, so interpreted, would not permit his admission. The Petitioners argue that the italicized word "or" in the quoted Rule should not have been equated with the conjunctive "and."

Following Judge Hauk's denial of Tigar's application, a plea of not guilty was entered on Munoz' behalf, and his criminal case was transferred to the Honorable Jesse W. Curtis, whoe name had been drawn by lot, for all further [2] proceedings. Judge Curtis did not receive additional evidence in connection with Tigar's application. He, as had Judge Hauk, based his denial of the application upon the sole and only ground that Rule 1(d) did not authorize the admission, *pro hac vice,* of an attorney in Tigar's position. This Petition for Mandamus followed. Since the Petition possibly presented at least one constitutional problem (*See Sanders v. Russell,* 401 F.2d 241 (5th Cir. 1968)), our court called for responses under the provisions of Rule 21, Fed. R. App. P.

Within the time prescribed, responses were filed. Since it then appeared that the Honorable A. Andrew Hauk was no longer concerned with Munoz' case, we denied the Petition insofar as it was directed to Judge Hauk. Shortly before we took this action, it came to our attention that District Judge Warren J. Ferguson had granted Tigar's application to appear *pro hac vice* as an attorney for the defendant in *United States v. Melvin Carl Smith,* No. 4277 in the Central District of California, and that a hearing had been conducted in connection therewith. We thereupon, when we entered our order denying the Petition as against Judge Hauk, called for a transcript of the hearing conducted by Judge Ferguson. That transcript has now been received. It reveals that Professor Tigar has also been admitted, from time to [3] time, to the Bars of a United States District Court of Missouri, a United States District Court of Illinois, a United States District Court of Washington, the United States District Court of the

Eastern District of California, and the United States District Court of the Eastern District of Louisiana. During the proceedings before Judge Ferguson, a discussion occurred concerning the effect of the Central District's Rule 1(d). At the conclusion thereof, and in granting Tigar's application, Judge Ferguson remarked: "The Court finds that the application is well taken. *That it is permitted under Local Rules,* and that there is no valid reason why the application should not be granted. Therefore it is granted." (emphasis added)[1]

Judge Ferguson apparently interprets Rule 1(d) to allow the admission, *pro hac vice,* of attorneys who are non-residents of the Central District, as well as attorneys who are residents but who do not maintain an office fr the practice of law.[2] Thus, under the interpretation contradicted that the office furnished to Tigar by the Law School of the University of California at Los Angeles is for his use only in connection with his professional duties at the University, and is not maintained for the practice of law.[2] Thus, under the interpretation of Judge Ferguson, Tigar would qualify for admission to the Bar of the Central District.

From the foregoing we see that there is a direct conflict in the opinions of at least two district judges of

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[1]The United States Attorney for the Central District of California has filed a response urging that the Petition be denied. In the hearing before Judge Ferguson, however, the Assistant United States Attorney, when asked for a comment in connection with Tigar's then application, replied: "Referring to Mr. Tigar's credentials, I am not sure I should oppose vigorously." He added, "I present no objection."

[2]Because Judges Hauk and Curtis believed that the Rule barred Tigar's admission *pro hac vice,* neither of them had any reason to decide whether Tigar maintains an office in the district for the practice of law. Assuming, but not deciding, that he does not, Tigar would qualify for admission *pro hac vice* under the interpretation of Judge Ferguson.

the Central District of California as to the correct interpretation of one of the District's specific Local Rules. Since this is true, the Rule should be clarified, not necessarily by judicial interpretation at this level, but by specific amendment. If the Rule permits of opposing [4] interpretations by different district judges of ability, then those, including Tigar, who might seek admission *pro hac vice* to the Bar of the District Court could surely not know, in advance, whether the Rule as now written does or does not bar the granting of their applications.

We do not choose, in a case such as this, unreasonably or officiously to intrude into the affairs of the District Court. Absent some constitutional restriction, it should properly rest within the discretion of any court to determine who should be admitted to practice before it and in what circumstances. Here, however, it is very clear that neither of the two judges concerned with the application of Munoz and Tigar in the District Court based their rejections upon the exercise of discretion in its ordinary sense. The transcript of the proceedings before Judge Hauk leaves no room for doubt that his rejection of the application rested upon his interpretation of the Rule in question. Judge Curtis, while reviewing the application, remarked, "I am not inclined to waive that rule at this time." This indicates that the challenged ruling of Judge Curtis was also predicated, not upon the exercise of discretion, but upon his then opinion that the Rule proscribed a decision to the contrary. When one is denied admission to practice solely upon the ground that a specific written provision controls. and when there is a divergence of opinion among district judges as to the proper interpretation of a rule of their own court, some effort toward clarifica-

tion is obviously necessary. We think it would be inappropriate, as well as unnecessary, for our court to undertake such an effort in the first instance. We do think, however, that the unique circumstances which we have outlined require that additional proceedings be conducted in the District [5] Court. And in those proceedings, we think it more desirable that the present ambiguity as to the meaning of the word "or" in the District Court's present rules be resolved in favor of Munoz and Tigar. The District Judge should then decide whether the rule permits the admission of Tigar *pro hac vice*, and if so, whether, in the exercise of his sound discretion, to so admit him. We are confident that Judge Curtis will not exercise his discretionary power arbitrarily; hence, we choose not to fix precise guidelines at this time.[4] Furthermore, believing that the judges of the Central District of California will have already recognized the need for a clarifying amendment to the Rule in question, we make no order in that respect.

The petition for Writ of mandamus, insofar as it prays that the District Court be ordered to admit Tigar, *pro hac vice*, is denied. The matter is remanded, however, for further proceedings not inconsistent with this opinion.

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[4]We reemphasize the fact that the record now before us does not reflect the slightest hint that Tigar is personally offensive or that he is morally or professionally unfit. Both Judge Hauk and Judge Curtis openly recognized Tigar's exceptional professional ability, as did the Assistant United States Attorney in the proceeding before Judge Ferguson. Upon remand, the district judge may, of course, receive additional evidence if he chooses to do so. Among the considerations which are relevant, and which are already readily apparent, is that the trial of Munoz in the principal case should be conducted as quickly as the disposition of pretrial questions, constitutional or otherwise, will permit. [1]

## APPENDIX C.

### Order.

United States Court of Appeals for the Ninth Circuit.

Rosalio Munoz and Michael E. Tigar, Petitioners, v. Hon. A. Andrew Hauk and Hon. Jesse W. Curtis, Respondents. No. 26587.

Before: DUNIWAY, ELY, and HUFSTEDLER, Circuit Judges

In its opinion accompanying this Court's order upon the original writ of mandamus, this Court held that Rule 1(d), Rules of the District Court for the Central District of California, was ambiguous. We remanded the case to the District Court with directions to resolve the ambiguity, and we indicated that the ambiguity should be resolved in favor of the applicant.

Upon remand the District Court received evidence directed to the question whether or not the applicant "does not maintain an office in this district for the practice of law." The District Court did not resolve that issue. Instead, the Court decided that the rule was not ambiguous, but even if it were, the ambiguity should be resolved against the applicant. It then denied the application because the applicant was a resident of the district.

This Court did not remand the cause for the purpose of permitting the District Court to reach a construction of the rule at variance with that started by this Court. The precatory language of the opinion about resolving the ambiguity in the applicants' favor apparently led the District Court [1] into overlooking our directions. Nothing in the record suggests that the

District Court's denial of the appiication was based on anything other than a reading of the rule contrary to our interpretation of it.

The record on the question of the applicants' maintenance of a law office in the district is before us. Evidence directed to the question of the applicants' maintenance of a law office in California was not conflicting. The Government did not oppose the motion, and it offered no evidence on the issue. The only question presented in respect of that issue is whether or not one who has undertaken the activities revealed by the evidence maintains an office for the practice of law. We resolve that question of law in the applicants' favor.

The processing of the writ, the proceedings on remand, and the pendency of the present motion have all seriously delayed the trial of Munoz.

The petitioners' motion for enforcement of this Court's order is granted. No useful purpose would be served by further prolonging the proceedings. We direct that the applicant be admitted pro hac vice for the single occasion of representing Munoz in the pending prosecution.

Pursuant to the provisions of rule 2, Fed. R. App. Proc., the mandate shall issue forthwith.

ROSALIO MUNOZ and MICHAEL E. TIGAR v. HON. A. ANDREW HAUK and HON. JESSE W. CURTIS - No. 26,587.

DUNIWAY, Circuit Judge:

I dissent.

I agree that our opinion and order require that the local rule be read as permitting admission of Tigar *pro hac vice* if he does not maintain an office for the

practice of law in the District. However, the rule does not require his admission, assuming eligibility; it only permits it. It seems clear to me that Judge Curtis would not admit him if he believed that the rule permitted admission. I would not compel him to do so. *Will v. United States*, 1967, 389 U.S. 90, 104, 107, and *Hooker v. United States District Court*, 9 Cir., 1967, 380 F.2d 5, 6, make it clear that mandamus is not to be used to compel a judge to exercise his discretion in a particular way. That is what the majority is doing.

Both Munoz and Tigar maintain that Tigar is uniquely qualified in Selective Service law. I decline to weigh such a claim. The Munoz case is just another draft case of which a large number are tried in the California federal courts every year. I can and do take judicial notice that there are plenty of competent attorneys in the Central District of California whom Munoz can find to represent him and who know a great deal about draft cases.

I would concur in an order requiring that Judge Curtis comply with that portion of our order dealing with the meaning of the rule, and that he determine first, whether Tigar is eligible under the rule as so construed, and second, if he finds Tigar eligible, whether he will admit him. But I cannot agree to an order by this court that Tigar be admitted.

## APPENDIX D.

### Order.

United States Court of Appeals for the Ninth Circuit.

Rosalio Munoz and Michael E. Tigar, Petitioners, v. United States District Court for the Central District of California, Respondent. No 26587.

Before: DUNIWAY, ELY, and HUFSTEDLER, Circuit Judges.

Respondent's petition for rehearing and suggestion of appropriateness of rehearing in banc filed on May 5, 1971, is untimely because it was filed after mandate was ordered issued. The court construes the petition having been considered on the merits, the petition is denied.

The memorandum opinion and order signed by a majority of the panel and the dissent, both filed April 21, 1971, are ordered published.

A judge in regular active service having requested that the court be polled on the question of the appropriateness of the suggestion for an in banc hearing, the poll was taken. A majority of the court's judges in active status has determined that a rehearing in banc shall not be conducted, and it is so ordered.

Five of the judges in regular active service, judges Chambers, Carter, Kilkenny, Trask, and Choy, have directed that it be noted herein that they would have heard the cause in banc.

Judge Wright, who disqualified himself, has taken no part in the disposition of the cause.

CHAMBERS, Circuit Judge, dissenting:

While it is disappointing that the entire court will not take this case en banc, I desire to point out that

the panel has not held that a district court may not have a rule that forbids one from being admitted pro hac vice for a case if the applicant has been in the State of California long enough to have qualified for admission to the California State Bar. Neither has it held that for good cause pro hac vice status may not be denied. (Judge Trask may be correct that a district judge does not have to make a record of "good cause" to reject a pro hac vice application, but I think such meaning may be implicit in the panel's opinions of April 21, 1971.)

The majority of the panel has simply held that the present local rule does not ipso facto bar Tigar and that denial on the basis of the rule cannot stand.

TRASK, Circuit Judge, dissenting:

I join in Chief Judge Chambers' dissent except that I disagree with the implication in it that a non-admitted attorney may not be denied pro hac vice status except for "good cause" shown of record. A non-admitted attorney may not appear by himself in a particular case except upon leave of court.

There is no rule of which I am aware that requires a judge in such a situation to make a record of "good cause" before rejecting his application. I do not understand that the panel has announced such a rule here.

JAMES M. CARTER, Circuit Judge dissenting:

I think Judge Duniway's dissent to the order of April 21, 1971, .....F.2d....., was correct.

I join in Chief Judge Chambers dissent to the present order.

## APPENDIX E.

### Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Jesse W. Curtis, Judge Presiding.

United States of America, Plaintiff, v. Rosalio Urias Munoz, Defendant. No. 6540-CD.

Place: Los Angeles, California

Date: Monday, March 22, 1971

Pages: 1 to 34

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LOS ANGELES, CALIFORNIA,

MONDAY, MARCH 22, 1971.

THE CLERK: No. 3 on the calendar, 6540, U. S. A. v. Rosalio Munoz.

THE COURT: Gentlemen, is there any change of position here?

MR. ORTEGA: I am Joe Ortega, a member of this court.

I would like to introduce Michael Kennedy, a member of the Bar of this State and a member of the Northern District of California, who will also be representing Mr. Munoz.

THE COURT: Well, is the motion on behalf of Mr. Tigar to be admitted then withdrawn?

MR. TIGAR: No, your Honor.

MR. KENNEDY: I would like to appear on Mr. Tigar's behalf for purpose of the hearing suggested by the Ninth Circuit opinion.

THE COURT: Yes. Well, I would suggest, then, that we proceed. I would like to have Mr. Tigar take the stand because I want to ask him a few questions.

MR. KENNEDY: May I while Mr. Tigar is on the stand ask a couple of preliminary questions in order to bring the court up-to-date? [4]

MICHAEL E. TIGAR,

having been duly affirmed as a witness, was examined and testified as follows:

THE CLERK: Please state your name for the record.

THE WITNESS: Michael E. Tigar.

DIRECT EXAMINATION

BY MR. KENNEDY:

Q Mr. Tigar, you are presently employed at the University of California Law School; is that correct?

A That's right.

Q Have you submitted a resignation to the Dean of the Law School?

A I have.

Q On what date did you submit that resignation?

A My best recollection is that it was January 14th or 15th of 1971.

Q Was that resignation accepted, to your knowledge?

A Yes, it was.

Q On what date do you anticipate you will terminate your position as a professor at the University of California?

A June 30, 1971.

Q Do you presently have plans with reference [5] to your residence?

A Yes. Upon leaving UCLA I intend very shortly thereafter to move to San Francisco.

Q And Dean Schwartz is the Dean of the UCLA Law School, is he not?

A Yes.

Q Has Dean Schwartz since the last time you were before his Honor, Judge Curtis, issued any rules or memoranda to law faculty members with reference to utilizing UCLA facilities or their offices for the practice of law?

A Well, it has never been the position of the Law School that professors were free to use their offices for the practice of law. However, it has happened that faculty members have used the Law School as a mailing address at which to receive papers in litigation which they might be involved in.

In October, I believe, or November 1970 Dean Schwartz sent a memorandum to all Law School faculty members directing that the Law School's address and the Law School telephones not be used in any pleadings or papers filed by members of the faculty.

Q Had you in fact been complying with the essential understanding of that memorandum even prior to its issuance by the Dean? [6]

A I have from time to time used the Law School address as a return address, but in reality all the litiga-

tion which I had been involved in prior to that time had been in association with various lawyers in various parts of the country, and it was their offices that I used principally.

Q Has your residence changed, Mr. Tigar, since you were before the court?

A Yes, it has.

Q What is your present residence?

A 34 Rose Avenue, Apartment 3, Venice, California.

Q Do you now or have you ever practiced out of 45 Rose Avenue, Apartment 3, or maintained it as a law office in any way?

A No.

Q Since your appearance here in court last have you been admitted to any other bars or any other courts?

A Yes. On February 10, 1971, I was admitted to the Bar of the United States Court of Appeals for the Ninth Circuit.

On January 5, 1971, I was admitted pro hac vice to the Bar of the State of California for purposes of the case of People v. Angela Davis in the Marin County Superior Court. [7]

Q I believe in December of 1970—

A Excuse me. That's right.

Q —pro hac vice to the Central District; is that right?

A That's right. In United States v. Melvin Carl Smith.

Q Tell us what judge admitted you on that occasion for the Central District.

A That was Judge Ferguson of this court.

Q In all of those cases to which we have referred was the United States Government a party?

A Yes.

MR. KENNEDY: Thank you, Mr. Tigar.

THE COURT: Well, as I understand it now, you say that you reside in Venice. You have changed your residence since the last time you were before the court?

THE WITNESS: That's right.

THE COURT: But you are still a resident of Southern California, the Los Angeles area?

THE WITNESS: That's right.

THE COURT: It is your intention, then, sometime during the summer, I take it, to move to San Francisco?

THE WITNESS: That's right, your Honor.

THE COURT: And where you will become a [8] resident there?

THE WITNESS: As of about the middle of February —and it's effective now—I have entered into an of counsel arrangement whereby I am of the counsel to the law firm of Kennedy & Ryan in San Francisco.

THE COURT: You are still admitted to practice in the State of California?

THE WITNESS: I am not a member of the California Bar.

THE COURT: You are not a member of the California Bar?

THE WITNESS: No.

THE COURT: Have you made application to become a member?

THE WITNESS: I have written the Bar Examiners, your Honor, and asked them for information concerning the procedure which I must follow as an out-of-state attorney. They have answered my letter as of last week and sent me the various forms, and so on, that are involved.

THE COURT: Now, you are a member of the Bar of the District of Columbia.

THE WITNESS: That's right.

THE COURT: Is that the only State or District in which you are a permanent member? [9]

THE WITNESS: That's right.

THE COURT: During this past year I take it you have participated in litigation, I judge from what you say, throughout the country.

About how many cases have you participated in?

THE WITNESS: Oh, it would be very hard to say, your Honor. Ten.

THE COURT: Where have they been?

THE WITNESS: In New Orleans, in Chicago, in Washington, D. C., in Dallas, in Marin County, and in Los Angeles.

THE COURT: Have those cases been of a common type or have they been all types of litigation?

THE WITNESS: Well, they have been most uncommon, I think, most of them.

THE COURT: Well, I mean do they have common relationship? Are they of a similar nature?

THE WITNESS: They are all criminal cases, your Honor. And almost without exception they involve constitutional issues of wiretapping, three or four of them; Selective Service, another three or four.

THE COURT: You represented a couple of defendants, I guess, in the Seattle trial, did you not? [10]

THE WITNESS: That's right, your Honor.

THE COURT: There was some disturbance up there, was there not, in the courtroom during their trial?

MR. KENNEDY: Excuse me. Your Honor, may I for purposes of the record apprise the court of the following fact: That the entirety of the transcript with reference to the Chicago incident was before the Ninth Circuit Court of Appeals at the time that Mr. Tigar was admitted to practice before that court. There has been no citation of contempt nor any criminal matters whatsoever to come out of that particular hearing.

THE COURT: There was no citation for contempt.

MR. KENNEDY: My position really is, your Honor—and I have no desire to interrupt your examination—my position on that would be that insofar as matters of that nature are concerned, I think they were foreclosed by the Ninth Circuit Court of Appeals' admission of Mr. Tigar to that bar on February 10th of this year.

THE COURT: I don't think that's so. Whether he is to be admitted here or not is a matter of discretion of this court. What may persuade the Ninth Circuit to admit him may or may not be persuasive here. I'm not bound by their appraisal of the situation.

Anyway, there was some disruption in the [11] courtroom in that case?

THE WITNESS: There was.

THE COURT: In the Seattle case. As a matter of fact, your two clients were found guilty of contempt?

THE WITNESS: They were adjudicated in contempt by the District Judge, yes, your Honor. That case is presently pending on appeal in the Ninth Circuit.

THE COURT: Did you make any effort to prevent them from engaging in the disturbance?

MR. KENNEDY: Well, if your Honor please, for the record, that assumes, if I may—that assumes, you know, that any efforts could have been availing, there was any opportunity, et cetera. It assumes a number of facts, your Honor, that are not yet before us.

THE COURT: The objection will be noted and overruled.

Did you attempt to do anything to prevent them from engaging in those uprisings or disturbances?

THE WITNESS: Your Honor, I am placed by your question in a very difficult position. Any conversations which I would have had with my clients other than conversations in which they would inform me of the intention to commit a crime or fraud are, of course, privileged.

THE COURT: I didn't ask you what they [12] said or what you told them, I just asked you if you had done anything to attempt to prevent them from engaging in this conduct.

THE WITNESS: Your Honor asked me if I had done anything. If you mean did I have conversations with them, then we are right back in the middle of the lawyer-client privilege. Unless those clients are here to

waive that I am not in a position to describe the discussions, if any, which I may have had with them.

THE COURT: I didn't want any quibbling, Mr. Tigar, I just wanted to know if you had done anything to prevent them from engaging in this conduct. Now, you don't have to tell me what was said or even whether you said anything, as far as that's concerned. This doesn't invade the lawyer-client privilege. I just would like to know what as a lawyer—you want to practice before this court. I would like to have some idea what you consider to be your responsibilities as a lawyer.

THE WITNESS: Does your Honor wish an answer to that question?

THE COURT: That wasn't the question. The question was, did you do anything to prevent these defendants from behaving in the manner in which they behaved at the time of the Seattle trial? Now, you may answer. You don't have to answer it if you don't want to. [13]

THE WITNESS: My answer to the question, your Honor, is that none of the conversations which I had with the defendants are conversations which are not covered by the terms of the attorney-client privilege.

I am happy for the purposes of any discussion your Honor wants to have to discuss my position on these questions as a general matter.

But your Honor understands the position in which I feel the question places me. If you direct me to answer, then I'll have to make another decision. My understanding is your Honor is not directing me to answer.

THE COURT: No. This is an informal hearing. I don't consider you are under any great compulsion to

answer any of my questions if you don't want to. You are here asking for this court's permission to appear here pro hac vice and for this defendant, and I wanted to make some inquiries whether I should permit you to do so. You don't have to answer me if you don't want to.

Well, gentlemen, I think this gets right back to where we were before on this thing. This rule, as I understand the rule to be, and as everybody, I think, who has been confronted with it in the 30 years which the rule has been in effect, considers the rule 1(d), as the heading indicates, it relates to non-residents. No one ever considered, at least until Judge Ferguson the other day, that [14] the rule was to apply to a resident.

I noticed in your brief to the court on the writ of mandamus you said that Judge Hauk and I had refused to grant your motion because you were a non-resident. That, of course, is contrary to the fact. You were refused because you were a resident, and being a resident and not being admitted to the State Bar we felt that you did not come within the rule.

Now, this is a local rule, it can be waived, Judge Ferguson saw fit to interrogate you quite thoroughly in order to determine whether or not you had the ability to represent a defendant, and he was convinced that you did, and I take his action to be a waiver of the rule, which he is entitled to do. He did say the rule was complied with.

But, in any event, if there be any ambiguity in this rule, and I don't believe there is any, I will exercise my judicial prerogative and discretion in this matter and adopt the interpretation which I think it should have, and I believe it does have, and that is the purpose of the

rule certainly is consistent with the state law that a resident of this State should not be permitted to violate the Business and Professions Code by being permitted to practice law.

Now, even though we permit you to act in court you have got to consult with your client, you have [15] got to advise with him and carry on the general preparation for trial, all of which is practicing law, and all of which is in violation of the California Business and Professions Code.

I don't think the federal court should, even though we may have the power to do so, override the state court in this respect.

So your motion to be admitted will be denied.

MR. KENNEDY: Excuse me, your Honor.

Before the court rules, may I be heard?

THE COURT: Do you have any more questions you want to ask Mr. Tigar?

MR. KENNEDY: One or two might come out of the argument, if I may, your Honor.

THE COURT: All right.

MR. KENNEDY: First of all, with reference to Judge Ferguson's finding, there is no indication that I was able to find in the record or in the Ninth Circuit's reading of the record wherein Judge Ferguson waived the rule. As a matter of fact, Judge Ferguson—

THE COURT: The reason I say that is the only thing he took into account was Mr. Tigar's ability. Now, whether Mr. Tigar is able or not is only germane to the issue of the exercise of the discretion as to whether the rule should be waived or not. [16]

MR. KENNEDY: No.

THE COURT: The application of the rule depends upon two things: the interpretation of the rule and the residence and office, nothing else.

MR. KENNEDY: The fact of Mr. Tigar's residence, namely, in the Central District of California, was specifically before Judge Ferguson and Judge Ferguson went into additional inquiry and Judge Ferguson did not waive the rule but in fact said: "It is permitted under local rules." That is a note that the Ninth Circuit made in their opinion.

So Judge Ferguson did not waive the rule but found in fact that there was an ambiguity in the rule which he resolved in favor of the applicant.

THE COURT: That's just the way I read it. I realize it is subject to the other interpretation, and I don't consider it important one way or another. He has his idea, I have my idea.

MR. KENNEDY: Fine. But what was significant to the Ninth Circuit on the writ of mandamus was that two honorable and learned members of the court of the Central District of California—

THE COURT: The emphasis is yours, counsel.

MR. KENNEDY: —disagreed—the language is partially the Ninth Circuit's—disagreed on the inter- [17] pretation of the rule. The court found, the Ninth Circuit panel found as a matter of fact and law that there is an ambiguity. They suggested that that ambiguity should be cleared up and not by judicial fiat from them but by amendment by the Central District judges.

They go on to suggest for purposes of this particular hearing to which we have all been remanded, they go

on to suggest that the appropriate interpretation of the rule, and I will quote them:

> "And in those proceedings we think it more desirable that the present ambiguity as to the meaning of the word "or" in the District Court's present rules be resolved in favor of Munoz and Tigar."

So the only issue we feel that is appropriate before your Honor inasmuch as there is no question about his general competency in the question of whether or not Mr. Tigar maintains a law office in the Central District of California.

It was for that purpose that I put him on the stand and asked him a number of questions this morning.

The evidence is uncontradicted that he does not now nor has he maintained an office for the practice of law in the Central District, but does in fact now, which was not the case last September—does in fact now maintain [18] an office in San Francisco. So he is qualified under Part 2 of Rule 1(d), namely, he has been admitted to the highest court of the District or a State, the District of Columbia, and, secondly, he does not maintain a law office in California.

THE COURT: That isn't the way I interpret it at all. Because it is under the heading that says "Non-Residents." The whole section applies and is applicable to non-residents, and he is a resident if anybody ever was a resident.

MR. KENNEDY: That was precisely the point before the Ninth Circuit on mandamus, your Honor.

THE COURT: Well, I have read the decision of the court and they have said that there is an ambiguity

and that both courts at this level had made conflicting decisions as to how the rule was to be interpreted. But they recognize that we both have discretion in this matter.

As I said, although I think this rule has no ambiguity whatever in it, it is clear to me and it is clear to 12 out of the 13 judges on this court, and it has been clear to everybody that has been concerned with it for 30 years, including those who had something to do with its drafting—even though there is an ambiguity I am exercising my discretion to accept the interpretation which I place on it. It doesn't make any difference whether anybody [19] else places that interpretation on it or not. That's my interpretation, and that's exercising my discretion which the Circuit Court said I have to deny the motion.

MR. KENNEDY: The Circuit Court did not suggest to your Honor that you had the authority to interpret the ambiguity in any way other than as they suggested.

What the Circuit Court did suggest is that you had discretion and you should have a hearing, which we are having this morning, to determine because the evidence was unclear from the prior hearing whether or not Mr. Tigar maintains a law office.

But your Honor's interpretation this morning—and I don't understand whether you are exercising discretion with reference to interpretation of the rule, whether you are saying you are finding no ambiguity in saying the rule does not permit Mr. Tigar's admission, or whether you are going off on some other finding. I don't understand.

Because the Ninth Circuit's mandate is to make an appropriate inquiry with reference to one specific point, namely; Does Mr. Tigar maintain a law office in the Central District?

THE COURT: I have found no such specific directions. They sent it back here for further consideration and for further construction of the rule by this court. [20] They suggest that in their opinion they think it ought to be interpreted most favorably for Mr. Tigar and Mr. Munoz.

MR. KENNEDY: And your Honor has not done that.

THE COURT: In the exercise of my discretion I am going to interpret it the other way. Now, they say this is an ambiguous rule.

MR. KENNEDY: You are saying it is ambiguous, your Honor?

THE COURT: No. I say they say it is ambiguous. I don't think it is. The Circuit Court says it is ambiguous and I say, assuming it is ambiguous, then—and although the Circuit Court from where they sit think that I should exercise my discretion and interpret it most liberally for Mr. Tigar and Mr. Munoz, I am the one who has to try the case, and I am the one who has control over the situation, and it is my discretion that is pertinent here. I expect to exercise my discretion, and I am exercising my discretion, which apparently they didn't think I had done before. And I am interpreting the rule to exclude Mr. Tigar.

MR. KENNEDY: But, your Honor, you are doing, as I understand the court—and I don't mean to belabor the point—if I understand the court, the court is doing this morning precisely what the court did on [21] September 29th, which is precisely what the Ninth Cir-

cuit said we should remand for because that probably wasn't the right thing to do.

THE COURT: No. The Ninth Circuit took great care in pointing out that neither Judge Ferguson nor I had used our discretion whatever, we merely interpreted the rule. We had not used any discretion. We had not exercised our discretion, although we had discretion in the matter. We hadn't exercised it.

Now I am exercising it.

MR. KENNEDY: If I understand it, on September 29th the court interpreted the rule, felt bound by the rule that inasmuch as Mr. Tigar was a resident of the Central District the rule would not permit his admission. That was my understanding of your initial ruling. Correct?

THE COURT: He didn't come under the rule. Of course, the rule—

MR. KENNEDY: But you exercised no discretion on that occasion.

THE COURT: Well, the Circuit Court said I didn't. If it is an ambiguous rule it seemed to me as if I had exercised some discretion, but they said I didn't.

On the basis of the fact that I hadn't exercised my discretion, they found it possible to send it back [22] for further consideration. Because if they had found that I had exercised my discretion at that time there would have been no basis for sending it back here.

MR. KENNEDY: But, your Honor, irrespective of whether you feel the rule is ambiguous or not ambiguous, irrespective of whether you are engaged in an exercise of discretion or are engaged in ruling based upon a fixed determination by you of the meaning of the rule, the upshot is precisely the same; that is, that

the Ninth Circuit Court of Appeals feels there is an ambiguity irrespective of—and they feel that ambiguity should be interpreted in one way notwithstanding whether the interpretation comes about as a result of your exercise of discretion or not.

So, you know, I am at a loss, I am attempting to understand so that I may—as your Honor is aware, we'll go back to the Ninth Circuit. But I don't wish to go back to the Ninth Circuit without a full understanding of your Honor's position.

THE COURT: I don't know what more I can say.

MR. KENNEDY: May I make a brief inquiry, then?

On the occasion of September 29th when this court ruled earlier, the court at that time ruled that Mr. [23] Tigar, inasmuch as he was a resident, was foreclosed from admission pro hac vice.

THE COURT: According to our rule, recognizing the fact that as a local rule it could have been waived, I chose, I used my discretion, I thought, at that time not to waive it.

MR. KENNEDY: Then in the interim a writ of mandamus was taken and the Ninth Circuit Court of Appeals said that that interpretation, the interpretation, namely, against Mr. Tigar and Mr. Munoz was not the proper interpretation to make.

Then we come back for a further hearing on—

THE COURT: No, they didn't say it wasn't. They said that there appeared to be an ambiguity in the rule, and since there was an ambiguity in the rule it was difficult for anybody to know from heading the rule whether they were included or excluded. They

recommended that the rule be amended. And I will say that the rule has already been amended. It hasn't been passed, but it has been approved by everybody.

But I am not relying on that at all. The next thing is they said that it should be sent back in language which I can only interpret to mean for reconsideration by this court with a suggestion or a recommendation that this court interpret the agreement more favorably toward [24] Mr. Tigar.

MR. KENNEDY: Did you say be resolved in favor of Munoz and Tigar and in the end—

THE COURT: The ambiguity be resolved in favor.

MR. KENNEDY: The present ambiguity as to the meaning of the word "or" which you interpret to mean "and," and the Ninth Circuit Court of Appeals interprets to mean "or," and sends it back to you to interpret it as meaning "or," because when "or" equals "or" it is then a favorable interpretation of the rules insofar as Mr. Tigar and Mr. Munoz are concerned.

Then, lastly, your Honor, they say that the matter is remanded, however, for further proceedings not inconsistent with this opinion. And I respectfully submit to the court that your interpretation this morning is in fact inconsistent with the opinion of the Ninth Circuit Court of Appeals.

THE COURT: I don't take it to be so.

MR. KENNEDY: Then your Honor is denying admission pro hac vice to Mr. Tigar exclusively for the reason that Mr. Tigar is a resident of the State of California presently?

THE COURT: Well, I am applying the rule—I don't know just what—exclusively because he is a [25]

resident of the State of California and doesn't come within the rule. The reason is that aside from the rule it doesn't seem to me that this court should permit a resident of the State to practice in this court where by so doing we are encouraging him and making it possible for him to violate the Business and Professions Code.

He is doing so in direct violation of the Business and Professions Code. He is not admitted to practice in this State. Being a resident, he should not be permitted to practice in this court rule or no rule.

MR. KENNEDY: But, your Honor, there was a gentleman here this morning from Chicago, who is not a member of the bar, practicing before your Honor.

THE COURT: That comes under an entirely different procedure, because he is not a resident of this State. That's what we are talking about.

MR. KENNEDY: The point is, then, that exclusively because Mr. Tigar is a resident is the reason your Honor is disallowing his application for admission pro hac vice this morning?

THE COURT: I am exercising my discretion in this matter and am refusing to grant the motion, period.

MR. KENNEDY: And your Honor, then, will not tell me whether I am correct or incorrect insofar as what my understanding of the court's ruling is? [26]

THE COURT: I think I have said all that I can say. If you are not satisfied with that explanation you will have to go unsatisfied.

MR. KENNEDY: Your Honor, it is not my desire to be satisfied or unsatisfied, it it my desire to be educated by the court, and I am afraid I am still somewhat illiterate as to the meaning, precise meaning of the court.

THE COURT: Well, as I said, counsel, I have said all I have to say.

MR. WILLING: Your Honor, I take it that Mr. Tigar's motion may be renewed when the newly-amended rule becomes effective.

THE COURT: What? What did you say?

MR. WILLING: If Mr. Tigar should care to renew his motion at a later date when the newly-amended rule becomes effective, I take it he could do so at that time.

THE COURT: Well, I can assure you that the new rule takes care of the ambiguity, and it is not applicable. Of course, I can't control Mr. Tigar's future action, and don't purport to.

What are we going to do about Mr. Munoz? I think we are going to have to set this matter for trial. If the Circuit Court says it, they can stay it, but I don't [27] think I should.

What happened to Mr. Kolostian?

THE CLERK: Judge Carr called upon his presence to be in his court.

THE DEFENDANT: Your Honor, as I have said before, I definitely do not want Mr. Kolostian to represent me. I still think that there are questions to be resolved as to whether Mr. Tigar can represent me. He is the man that I definitely want to represent me.

If in fact I have to appear in court without the services of Mr. Tigar, then I could prefer at this point to represent myself in this case.

THE COURT: Well, Mr. Munoz, what education have you had?

THE DEFENDANT: Have I had?

THE COURT: Yes.

THE DEFENDANT: I have a bachelor's degree in history, Bachelor of Arts from the University of California at Los Angeles.

THE COURT: Have you ever studied any law at all?

THE DEFENDANT: I have read through different kinds of cases and different kinds of courses.

THE COURT: You see, the difficulty is, in cases of this kind I have to be assured that you are [28] capable of representing yourself and that you don't pass up some opportunity to defend yourself in a proper way.

There are technical rules of evidence, and things of that kind, that you may and should know something about, otherwise you can jeopardize your position.

THE DEFENDANT: I feel that in this case my feelings—

MR. KENNEDY: Excuse me. May I confer very briefly with Mr. Munoz?

THE COURT: Yes.

MR. KENNEDY: I might be able to straighten it out.

(Other court matter.)

THE COURT: Mr. Munoz, have you resolved the matter?

THE DEFENDANT: Yes. As I made clear beforehand, I want Mr. Tigar to represent me in this case, period, and we'll exhaust all avenues I have to see if it is possible that he can. That is my position.

THE COURT: Well, in the meantime—

THE DEFENDANT: If I am ordered to report in court, at present if I need to be represented then I would represent myself until I have exhausted all avenues.

THE COURT: Well, the thing that concerns me a little is in these cases, Draft Act cases [29] especially, where it is requested that a defendant be permitted to represent himself, I always appoint an attorney for him. It is up to him whether he wants to consult with him, but he will be designated as your attorney, he will be available at all times, he would be expected to be with you at the time of the trial, sit in with you, and sit at the table. And I inform the jury that the defendants has been given appointed counsel, that he has the right to consult with him if he wishes, but that he does not have to consult with him if he doesn't want to.

Nevertheless, for the orderly processes of this court it is necessary that the defendant comply with all the rules of evidence, even though they may be technical, and that I have to insist on that, and that they must not feel any sympathy or bias in favor of the defendant merely because he is not represented by counsel.

So that is the format that I will follow here. I would like to have somebody acting as your attorney as these matters move along.

THE DEFENDANT: Well, again, my position is that I am going to exhaust every avenue I have.

THE COURT: Well, that can be done collaterally.

THE DEFENDANT: I will not want to officially in any consult another attorney. [30]

THE COURT: Well, then, Mr. Kolostian, you are appointed to represent this defendant.

MR. KOLOSTIAN: May I address the court on that?

THE COURT: Yes.

MR. KOLOSTIAN: I apologize for removing myself from the courtroom. It was a matter of a case before Judge Carr.

I have personal feelings toward this case, Your Honor, and there are conflicting canons of ethics that require me in this case to request to be removed and relieved as counsel of record. I would file an affidavit, if the court so desires, expressing my opinion.

THE COURT: No, I guess not.

MR. KOLOSTIAN: I would have filed one earlier, but I have been ili for two weeks and am still ill as a practical matter, your Honor. I would ask the court that counsel that are in the courtroom today that are a member of the California Bar—that one of these individuals could be appointed.

THE COURT: Are there any California attorneys who are local residents who would like to be—

MR. KOLOSTIAN: This gentleman sitting here is a member of the California Bar.

THE COURT: Are you local? [31]

MR. ORTEGA: Yes, I am a member of the bar of this court. Mr. Munoz said he does not wish to have a legal adviser, so I would respectfully decline such an appointment because I think it would be a meaningless, formal thing, and I wouldn't want to be a party to such a thing, which is a formalistic thing which has no real meaning. I think Mr. Munoz feels very strongly about this matter and does not wish any-

body but Mr. Tigar, and wishes to proceed by himself. For that reason I would respectfully decline.

THE COURT: The matter will be put over to April 5th and we will appoint counsel in the meantime to represent you; at least, counsel to be with you. As soon as we can get counsel then we are going to set the matter for trial and we'll move along.

Now, if the Circuit Court issues a stay, why, we will abide by it, of course. But I think this matter should go on to trial. It has been since last October.

MR. KOLOSTIAN: Thank you, your Honor.

MR. WILLING: Your Honor, with respect to the issue of appointing counsel, I would just like to bring to your Honor's attention the fact that while the Government thinks that appointing counsel as an adviser is appropriate, early this month the Circuit wrote an opinion which— [32]

THE COURT: I am familiar with it, counsel.

MR. WILLING: Yes, your Honor. [33]

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In the United States District Court Central District of California.

United States of America, Plaintiff, v. Rosalio Urias Munoz, Defendant. No. 6540-CD.

CERTIFICATE

I, Jack Ellis, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of March, 1971.

JACK ELLIS, Official Reporter [34]

## APPENDIX F.

### Statement of Respondent Judge Jesse W. Curtis.

I had thought that a trial court had broad discretion in the conduct of his court and in the control of attorneys appearing before him. I, also, thought that local rules made by the trial judges for their own guidance, which may be rescinded or amended at will, could be waived in part, or in whole, or interpreted within reasonable limits as a particular judge in a particular case might desire to do. It, therefore, did not appear to me arbitrary or capricious to refuse to apply to a resident attorney of this State a local rule, the heading of which indicates in so many words that it is intended to apply to nonresidents only.

I, therefore, thought the attempt by the majority of the panel of the Circuit Court, hearing the petition for writ of mandate, to interfere with this court's exercise of its discretion was improper and unauthorized.

In its first opinion, however, the panel laid great stress upon the assumption that this court had not, at that point at least, attempted to exercise its discretion, but had merely placed an interpretation upon a local rule with which the panel disagreed. Upon remand, this court was instructed to conduct additional proceedings.

> "And in those proceedings, we think it more desirable that the present ambiguity as to the meaning of the word 'or' in the District Court's present rules be resolved in favor of Munoz and Tigar. The District Judge should then decide whether the rule permits the admission of Tigar *pro hac vice*, and if so, [1] *whether, in the exercise of his sound discretion, to so admit him.*" (Emphasis ours)

I accepted what I thought was the panel's invitation to now exercise my discretion. At the conclusion of the second hearing, therefore, I thought I had made it crystal clear that in the exercise of my discretion, Mr. Tigar was not to be admitted in my court. Although I reasserted my belief that the rule was not applicable to him, I gave two reasons for the exercise of my discretion. First, irrespective of any rule, I do not believe in encouraging the practice of permitting attorneys who are residents of this state to practice law in violation of the spirit and the language of the State Bar Act. Secondly, Mr. Tigar admitted on the stand that he had been the attorney for certain defendants in the Seattle case who had engaged in disruptive practices in the court. He refused to answer this court's question as to what, if anything, he had done to prevent such disruption. Obviously, he did nothing.

To permit an attorney who carries his responsibilities as an officer of this court so lightly to practice in my court without the additional control that membership in the State Bar would provide, appears to me to be unwise.

I thought that certainly these two reasons would be sufficient to justify the exercise of my discretion, without burdening the record, or without embarrassing unnecessarily the parties to this action.

The panel apparently places great importance upon the fact that the record "does not reflect the slightest hint that Tigar is personally obnoxious or that he is morally or professionally unfit." I was unaware that it was necessary for the record to so show, and I [2] was futher unaware that it was necessary for the court to reveal the complete rationale for the exercise of its

discretion. Had I realized it was necessary, I would have recited these additional factors.

Much of Mr. Tigar's recent legal activity has been the representation of defendants in trials growing out of confrontations between the police and protest groups. In several, serious courtroom disruption has occurred in which Mr. Tigar's clients have participated actively and overtly. In at least one trial, he refused the court's frequent request to assist in controlling his clients. On one occasion, Mr. Tigar, himself, participated and assaulted a United States marshal, a complete video tape of which has been made available to this court, in U.S. v. Marshal, No. 26,889 [9th Cir.] as Exhibit 5. On the other hand, the case in which Mr. Tigar seeks to be admitted is not an ordinary draft case. The defendant, Mr. Munoz, is an active leader of the Chicano movement in this area. He has led several protest marches which have resulted in confrontations with the police and in violence. He is frequently shown on television news reports and is quoted in the daily press as making statements which are highly inflammatory in nature. Temperamentally, he is extremely volatile. He is articulate and insists on representing himself if he cannot have Mr. Tigar. To permit Mr. Munoz, who has great potential for trouble making, to be represented by Mr. Tigar with his propensity for at least condoning it, would not in my opinion be conducive to a fair, orderly or just trial.

I consider Mr. Tigar professionally unfit to appear in my court in this case.

Date: April 29, 1971.

JESSE W. CURTIS
United States District Judge

# APPENDIX G.

## Request by Eleven U.S. District Judges for Rehearing in Banc.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ROSALIO MUNOZ and MICHAEL E. TIGAR,<br><br>Petitioners,<br><br>v.<br><br>HONORABLE A. ANDREW HAUK and HONORABLE JESSE W. CURTIS,<br><br>Respondents. | No. 26,587 |

TO THE HONORABLE RICHARD H. CHAMBERS, Chief Judge of the above entitled Court:

We, the undersigned Judges of the United States District Court for the Central District of California, do hereby request that the respondents' motion for rehearing, attached hereto, be heard by the Ninth Circuit Court of Appeals sitting in banc.

Respectfully submitted,

FPI—LK—8-23-62—1M—6562

Senior Judge

Senior Judge

BEST AVAILABLE COPY

SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
DEC 9 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-630

71-631

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and HON. JESSE W. CURTIS,

*Petitioners,*

*vs.*

COURT OF APPEALS FOR THE NINTH CIRCUIT, ROSALIO U. MUNOZ and MICHAEL E. TIGAR,

*Respondents.*

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**Respondents' Opposition to Motion for Leave to File and Petitions for Writs of Prohibition and Certiorari.**

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IN THE

# Supreme Court of the United States

October Term, 1971
No. .....

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and HON. JESSE W. CURTIS,

*Petitioners,*

*vs.*

COURT OF APPEALS FOR THE NINTH CIRCUIT, ROSALIO U. MUNOZ and MICHAEL E. TIGAR,

*Respondents.*

## Respondents' Opposition to Motion for Leave to File and Petitions for Writs of Prohibition and Certiorari.

### Introduction and Summary.

Respondents Muñoz and Tigar, the real parties in interest herein, respectfully oppose the granting of the motion for leave to file petition for a writ of prohibition and the granting of a writ either of prohibition or of certiorari in this case.

As the argument will show, the petition for certiorari is untimely for reasons which the record below reveals. Moreover, the petitioners' own argument demonstrates why the extraordinary remedy of prohibition should not be available to further prejudice respondent Muñoz's right to a speedy trial.

Turning to the merits, the respondents argue in the alternative: The principal issue presented by petitioners does not clearly emerge from the tangled record below, which produced a relatively commonplace decision on a relatively minor point of statutory construction. If, however, this Court believes the case must be heard, respondents suggest that the issues mentioned at page 15 of the petition for certiorari be given pride of place in plenary hearing: the sixth amendment right of every federal criminal defendant to counsel of her or his choice;* the right of counsel confronted with an admission proceeding to a fair hearing on her or his alleged "unfitness," and the denial of equal protection of the laws and due process of law by a system of rules for admission to a federal court bar (*pro hac vice*, in this case) which irrationally prefers "nonresidents" to "residents". There are also first amendment issues to be considered here.

**The Petition for Certiorari Is Untimely.**

The petitioners' recital of the relevant dates is in error. The actual facts are these: The petition for writ of mandamus was filed in October 1970. The Court of Appeals entered an order concerning it on December 17, 1970 (Petition, App. A). The Court of Appeals denied the petition for mandamus, but entered an order adopting a construction of the district court rule favorable to petitioners (Respondents in this Court), on March 17, 1971 (Petition, App. B). Tigar and Muñoz, with this order, went before Judge Curtis on

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*Although California's Supreme Court has by a decisive opinion declined to take a role in setting qualifications for federal practice (as we note below), petitioners' counsel are apparently engaged by the California State Bar, a statutory body.

March 22, 1971, and the judge denied Tigar's application (Petition, App. E).

Tigar and Muñoz then filed a "Petition for Rehearing and, In the Alternative, Motion for Enforcement of the court's order." The Court of Appeals, one judge dissenting, treated this paper as a motion to enforce the March 17, 1971, order, and granted said motion on April 21, 1971 (Petition, App. C).

The district judge, Petitioner in this Court, then filed a "Petition for Rehearing" of the April 21, 1971, order, which was denied August 9, 1971. Tigar and Muñoz maintained in the Court of Appeals, and repeat here, that Judge Curtis' complaint, if any, was with the March 17, 1971, order, and that his May 5, 1971 petition for rehearing was untimely.

The order of April 21, 1971, merely enforced the March 17 order, and the district judge did not file a petition wthin fourteen days from March 17. He must, therefore, be taken to have waived objection to it in the Court of Appeals.

More importantly, the time for filing a petition for certiorari began to run on March 17, 1971, not later, since only a timely petition for rehearing suspends the running of time.

This point is important here because the dilatory tactics of Petitioners prevented Muñoz's criminal case, in which the charge is an induction refusal allegedly committed in 1969, from being tried.

Furthermore, in not raising in a timely fashion the objections petitioners now recite, the Court of Appeals could not have considered those arguments in reaching its April 21, 1971 decision on the appropriate construction of the rule.

**The Petition Discloses Why a Writ of Prohibition Should Not Be Entertained.**

Mandamus, says the Petition, was improper in this case, and the Court of Appeals should not have used it. Yet another extraordinary writ is being sought in this Court.

Respondents contend that mandamus was proper below and that prohibition should be refused in this court.

1. Mandamus under the All Writs Act may be granted whenever the Court of Appeals will eventually have power to review the respondent court's judgment. Use of the writ involves questions not of power but of prudence. *Roche v. Evap. Milk Ass'n,* 319 U.S. 21, 25 (1943): *LaBuy v. Howes Leather Corp.,* 352 U.S. 249, 255 (1957).

This Court is asked to review a *prudential* judgment not an excess of jurisdiction, so prohibition is not available.

2. Mandamus lies to correct an "abuse of discretion," *LaBuy, supra,* at 257, to redress a denial of constitutional right when there is no adequate remedy by appeal, *Beacon Theaters v. Westover,* 359 U.S. 500 (1959), and to compel performance of a ministerial duty. The argument below, under "The Constitutional Issues," discloses ample ground for the Court of Appeals' use of the writ. The original petition by Muñoz and Tigar in the Court of Appeals also discloses such grounds, as does the Court of Appeals March 17, 1971, order.

3. The use of extraordinary writs by a criminal defendant to vindicate a claimed right is looked upon with some disfavor due to the policy against piecemeal

appeals in criminal cases. See *United States v. DiBella*, 369 U.S. 121, 125 (1962). However, the use of such writs at the behest of government or court, against the will of the defendant, is conceivable only in the rarest of cases, since such use deprives the defendant of a speedy trial and frustrates the federal policy that only the defendant (not the government or the court) can take an appeal in a criminal case except as the Criminal Appeals Act provides. See *United States v. Will*, 389 U.S. 90 (1967). Hence, while the Court of Appeals may properly use mandamus to prevent an injustice to Muñoz, this Court ought to hesitate long before considering on the merits a proposal to issue a prohibition.

4. The issues here are not yet ripe. The district court will soon issue a new rule (see Petition, App. E, pp. E-20, E-21), and the Court of Appeals will perhaps be faced with a challenge to that rule. The opinions below decide nothing except how the word "or" in the present rule should be read.

The considerations adduced above also militate, respondents suggest, against granting the petition for certiorari.

**The Constitutional Issues of Right to Counsel and Due Process.**

In their petition for mandamus to the Court of Appeals, Petitioners urged upon the court both broad and narrow grounds of decision. If a certiorari is granted, and the whole record brought into this Court, respondents suggest that the following issues be framed.

1. Whether a federal criminal defendant has an absolute right to counsel of her or his choice if that

counsel is a regular member of the bar of the Court of Appeals in which the District Court is located, and/or a member of any Federal District Court Bar, and/or a member of the bar of any State, and/or a member of the bar of this Court. Whatever the wisdom of requiring state bar membership in the state in which the federal court sits as a condition to practice in diversity cases (where there are state law issues), the right of a federal question litigant should not be so confined. A criminal case raises Sixth Amendment issues in this regard. Since Andrew Hamilton came to New York to represent Zenger, there has been a feeling that the local coterie of lawyers may sometimes be of questionable value to a defendant.

Several courts have considered this question and have reached the result suggested here. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1970); *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1963); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968). Compare *Sperry v. Florida*, 373 U.S. 384 (1963).

The petition for certiorari badly misstates the California and Ninth Circuit law on this point. *Wasserman*, cited at pages 12, 15 and 16 of the petition, dealt with a regular and not a *pro hac vice* admission.

Of course, States will continue to be the primary licensing bodies for lawyers. Then, lawyers will become members of their local federal bar, as residents perhaps. But they should, respondents suggest, be free to practice in other federal district courts (as they are, by the new Rules of Appellate Procedure, free to practice in all Courts of Appeals). Of course, there

may be a requirement to associate "local counsel," and respondents herein have always been ready to do this.

California recognizes this principle, and Judge Curtis' remark at pages 2-9 and E-20 (App. E to Petition) is in error. California courts have consistently held that a person may practice in federal courts, live in California, have an office in California, and *never* become a member of the California Bar, all without violating any rule of California law. See *In re McCue,* 211 Cal. 57, 293 Pac. 47 (1932); *Cowen v. Calabrese,* 230 Cal. App. 2d 870.

More recently, a California court has admitted respondent Tigar to practice *pro hac vice* in a *state* criminal case. *People v. Angela Y. Davis,* Marin Co. Superior Ct.).

2. The petition darkly suggests that Judge Curtis was "reliably informed of affirmative misconduct by Tigar." Petition, page 16. The statement underscores an ugly aspect of this case. There has never been a hearing at which this "reliable information" has been subjected to cross-examination or even to public view. The "Seattle incident" is now in the law books in the opinion of the Court reversing the contempt convictions. *United States v. Marshall,* No. 26,889 (9th Cir., Nov. 18, 1971).

Respondents will not tax the Court's patience with a defense of Tigar's professional record as lawyer, law professor, author and Visiting Fellow of the Center for the Study of Democratic Institutions. Tigar is, quite simply, Muñoz's choice as counsel. He is a member of the Ninth Circuit bar, of the District of Columbia Bar, and has practiced in many courts. If petitioners

want to blemish his reputation and keep him from practice they should hold a fair hearing. See *Greene v. McElroy,* 360 U.S. 464.

3. The Local Rule, as quoted at pages 8-9 of the petition, establishes a distinction between residents and non-residents. Residents of the Central District who are not members of the California Bar may not practice in the district court; non-residents may practice.

If the rule seeks to ensure that those living in California become members of the California bar before practicing in federal court, it is plainly under inclusive with respect to its purpose.

If the rule seeks to ensure that litigants are represented by lawyers with a knowledge of California law, it makes no sense whatever. The "local counsel" requirement is not in issue here. There is simply no basis for saying that Muñoz could have a lawyer who lives in Kankakee, Illinois, but not one who lives in Los Angeles or Santa Barbara, California.

The rule therefore violates due process of law as being irrational and based upon an improper classification. See *Shapiro v. Thompson,* 394 U.S. 618 (1959).

4. The defense in this case is sponsored by the Mexican-American Legal Defense and Education Fund. Muñoz, an indigent, would otherwise have to rely on appointed counsel. Two issues emerge: first, appointed draft lawyers in Los Angeles may or may not be adequate, *United States v. Norman,* 413 F.2d 789 (1969); second, there are important first amendment questions here. See *NAACP v. Button,* 371 U.S. 415 (1963); *UMW v. Illinois State Bar,* 389 U.S. 217 (1967).

## Conclusion.

For the foregoing reasons, the motion for leave to file a petition for Writ of Prohibition should be denied, and the petition for Writ of Certiorari denied. If the Court hears the merits, it should frame the questions to be briefed so as to decide the serious underlying constitutional issues mentioned above.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

Supreme Court, U.S.
FILED
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October Term, 1971

No. 71-630

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
AND
HONORABLE JESSE W. CURTIS,
*Petitioner,*

*vs.*

COURT OF APPEALS FOR THE NINTH CIRCUIT,
*Respondent,*

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Real Parties in Interest,*

No. 71-631

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*Petitioner,*

*vs.*

ROSALIO U. MUNOZ AND MICHAEL E. TIGAR,
*Respondents.*

## REPLY IN SUPPORT OF PETITIONS.

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## REPLY IN SUPPORT OF PETITIONS.

By the petitions herein, petitioner seeks to correct a judicial usurpation of power in the use of mandamus to compel petitioner to exercise his discretion in favor of *pro hac vice* admission of Michael E. Tigar to the District Court bar. This compelling ground for granting the relief sought is almost totally ignored in the opposition of respondents and real parties in interest Munoz and Tigar ("respondents" herein).

## I.

## The Petition for a Writ of Certiorari Is Timely.

In the petitions, petitioner pointed out that the petition for a writ of certiorari was timely because filed within 90 days of the Court of Appeals' order of August 9, 1971, denying petitioner's May 5, 1971 Petition for Rehearing of the Court of Appeals' order of April 21, 1971. (Petitions 4-6). Respondents urge, however, that petitioner's complaint is with the Court of Appeals' order of March 17, 1971, that petitioner's May 5, 1971 Petition for Rehearing was untimely as to that order, and that the time for filing a petition for a writ of certiorari ran from March 17, 1971, because only a timely petition for rehearing suspends the running of time. (Op. Br. 2-3). Respondents' argument is in error.

First, petitioner does not here seek review of the Court of Appeals' order of March 17, 1971. That order, while indicating the "desirable" construction of the local rule with respect to Tigar's application for *pro hac vice* admission, denied respondents' petition for a writ of mandamus. Petitioner was not aggrieved by that action. The Court of Appeals' order of April 21, 1971, on respondents' petition for rehearing and, in the alternative, motion for enforcement of the order of March 17, summarily directed Tigar's *pro hac vice* admission, disregarding petitioner's discretionary power over such admission.

Second, even if the March 17, 1971 order were to be considered as commencing the time for filing a

petition for certiorari, respondents' own petition for rehearing was pending until April 21, 1971, thereby suspending the running of time.

Finally, even if petitioner's Petition for Rehearing were untimely, the Court of Appeals considered it on the merits and the time for filing a petition for a writ of certiorari runs from the date rehearing was denied. As held in *Bowman v. Loperena,* 311 U.S. 262, 266 (1940):

> ". . . The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. *But where the court allows the the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof."* (Emphasis added)

Here, although construing petitioner's Petition for Rehearing as a petition to recall the mandate and a suggestion of rehearing in banc, the Court of Appeals expressly stated that the petition had been considered on the merits. Hence, the time for filing a petition for certiorari commenced to run on August 9, 1971. See Stern and Gressman, Supreme Court Practice (4th Ed. 1969) pp. 248-249.

## II.

### Issuance of Mandamus Is Discretionary Only After a Determination That It Is Otherwise Proper.

The opposition seizes upon the oft repeated proposition that:

> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court."
>
> *Roche v. Evaporated Milk Association,* 319 U.S. 21, 25 (1943).

From this, it is argued that the Court of Appeals' issuance of mandamus involved "questions not of power but of prudence" (Opp. Br. 4), which are not reviewable in this Court.

*Roche* itself belies this conclusion. In reversing the issuance of mandamus, this Court held that ". . . in the circumstances of this case there are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ." 319 U.S. at 25.

*La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957), also cited in the brief in opposition, is not to the contrary. There this Court affirmed the issuance of mandamus by the Court of Appeals because it "was justified in finding the orders of reference were an abuse of petitioner's power. . . ." 352 U.S. at 256. This Court carefully reviewed the record and concluded:

> "The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." 352 U.S. at 260.

Here, none of the threshold requisites for invoking the discretionary power of the Court of Appeals were satisfied.

## Conclusion.

The petitions herein raise an important question of the usurpation by the Court of Appeals of discretionary power which belongs to the District Court alone. That usurpation of power can and ought to be corrected by this Court.

Respectfully submitted,

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